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Submitted by
WILLIAM I. SIEGEL

Supreme Court of the United States

October Term, 1954

SANTO CAMINITO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks review of the judgment of the County Court of Kings County *dated March 2, 1942,* convicting him of the crime of MURDER IN THE FIRST DEGREE and sentencing him, by reason of the jury's recommendation of mercy (Penal Law, Sec. 1054-a), to life imprisonment. The judgment was affirmed by the Appellate Division of the Supreme Court, Second Judicial Department (265 App. Div. 960) and by the Court of Appeals (291 N. Y. 541). A motion for reargument made in person by petitioner in the Court of Appeals was denied (297 N. Y. 882) in 1948. A further motion for reargument made by counsel for petitioner was denied by the Court of Appeals on June 3, 1954 (not yet reported).

ARGUMENT

I.

The Court lacks jurisdiction to entertain the petition.

Petitioner's reliance on Section 1257 (3) and 2101 (c) and (d), Title 28, U. S. Code, Rule 38½ and Rule 22 of the Revised Rules of the Court, effective July 1, 1954, to establish jurisdiction on the part of the Court, is misplaced.

Section 1257 merely grants general jurisdiction to entertain the claim of a right under the Constitution, but this claim must be pressed within the time limits established by Statute and Rule. Section 2101 (d) expressly limits the time of application for writ of certiorari to review the judgment of a State Court in a criminal case to the period prescribed by the rules of this Court: 90 days after the entry of final judgment of the State Court of last resort as directed by Rules 22 and 38½.

Unquestionably the instant petition was not filed within such 90 days after the entry of the judgment. Petitioner affects to find an exception to the rule in the alleged fact that the New York Court of Appeals entertained and denied the motion for re-hearing and that, therefore, "the 90 day limitation during which this Court may entertain this petition begins to run from the date of such denial". He cites in support of this position *Citizens Bank of Michigan City* v. *Opperman*, 249 U. S. 448; *United States* v. *Seminole Nation*, 299 U. S. 417; and *Leishman* v. *Associated Electric Co.*, 318 U. S. 203. The resemblance between these and the instant case is more apparent than real, for in all of

them there occurred proceedings, illustrative of the doctrine announced in *Leishman, supra*:

> "In so holding that court recognizes the general rule that where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend, or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion."

In actuality, however, petitioner's proceeding in the New York Court of Appeals was not, as he denominated it, a motion for re-argument of the appeal. The facts of the proceeding, when viewed in the light of the history of the case, disprove and discountenance the title given to it by petitioner.

In his moving papers, petitioner made the following points:

(1) That the trial court erroneously admitted his confession into evidence after refusing him an opportunity to offer evidence that the confession was not voluntary.

(2) That the trial court erred in not ruling as a matter of law that the confession was involuntary.

(3) That the trial court erroneously refused a request to charge on the subject of illegal detention.

An examination of the points raised both on the original appeal in the Court of Appeals, and on the 1948 motion for re-argument thereof, discloses beyond cavil or doubt that these points were identical with those asserted in the last, 1954, motion from the denial of which certiorari is now sought in this Court. Thus, on the appeal from the

judgment of conviction, petitioner's points were *in haec verba*:

(1) "The trial court erred in refusing appellant the opportunity to offer evidence that his confession was not voluntary before admitting the same in evidence."

The substance of the argument was that after appellant's counsel had examined a detective with respect to the voluntariness of the alleged confession, the Court refused to permit proof on the part of the defendant "as to whether or not the admissions were voluntary".

(2) "The trial court erred in not taking from the jury the question whether appellant's confession was voluntary."

The burden of this argument was that as matter of law the proof of coercion and delay in arraignment was so strong that the Court should itself have held the confession to have been involuntary.

(3) "The trial court erred in refusing to charge as requested on the subject of illegal detention."

The substance of this contention was that the charge as actually given by the trial court on this point did not sufficiently insure appellant's rights.

The identity of grounds on the last application in the Court of Appeals for re-argument with the contentions made on the appeal from the judgment and in the 1948 motion for re-argument can lead to but one conclusion: that petitioner's real purpose in moving in the Court of Appeals

in 1954 was not to procure re-argument. He could have had no hope of such result in view of the prior history of the case. On the contrary, his real—and sole—purpose is shown in the notice of motion which in its relevant part states that the motion is brought "for an order granting leave to the defendant-appellant to re-argue the appeal herein, *and for an order to amend the remittitur in the action to state the grounds of the decision of this Court in order to remove uncertainty, avoid litigation and make it appear to the Supreme Court of the United States, upon application for a writ of certiorari, whether or not a Federal question was necessarily decided.*" (Italics ours.)

The motion, it is obvious, was to the petitioner merely a necessary evil, an unavoidable procedural step in the sequence of steps made obligatory upon him by the rules of this Court. It was made only for the purpose—the abortive purpose—of tolling the Statute of Limitations (which in effect Rules 22 and 38½ are). That is, a motion which is merely denominated a motion for re-argument is shown by the record to have been in reality nothing but a motion to amend the remittitur.

That being so, the making of the motion in the Court of Appeals, and its denial, is ineffective to toll the statute and rules. This Court has so held in *Department of Banking* v. *Pink*, 317 U. S. 264, 87 L. Ed. 254. There, after affirmance by the New York Court of Appeals of an order of the Appellate Division, a motion was made on behalf of the Department of Banking in the Court of Appeals to amend the remittitur by adding to it the statement that a Federal question on which the petition for certiorari in this Court relied was presented and necessarily passed upon in the

Court of Appeals. The similarity with the instant case is obvious. As this Court said:

> "So far as appears, the motion did not seek a re-argument or re-hearing of any part of the case; it was no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case."

The motion was granted and the remittitur amended by the Court of Appeals. Nevertheless this Court dismissed the petition for certiorari for want of jurisdiction, saying in a *per curiam* opinion:

> "Under the three-months limitation imposed by the statute, 28 USCA §350, the petition for certiorari is timely only if the amendment of the remittitur extended the time within which to apply for certiorari. We are unable to conclude that it had such effect. Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged; what was sought was merely the court's certification that a federal question had been presented to it for decision, and this could have no different effect on the finality of the judgment than a like amendment of the court's opinion.
>
> A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. Here no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended. Accordingly we must deny the petition

for certiorari on the ground that it was not filed within the time provided by law.

* * * * *

For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (Wick v. Superior Ct., 278 U. S. 575, 73 L. ed. 515, 49 S. Ct. 94; Cheltenham & A. Sewerage Co. v. Pennsylvania Pub. Utility Commission, No. 160, decided October 12, 1942, 317 U. S. 588, post, 482, 63 S. Ct. 38), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (see Gorman v. Washington University, 316 U. S. 98, 86 L. ed. 1300, 62 S. Ct. 962). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, *since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established.*" (Italics ours)

There is an additional ground, we submit, why this petition should be dismissed. The proceeding is fatally tainted with laches. Petitioner failed to move in the Court of Appeals in any fashion during the period from July 29, 1943 when that Court affirmed the judgment of conviction, until his first motion for re-argument almost five years later, nor did he in that same period bring on any petition in this Court. Similarly a further period of over five years intervened with complete inaction on his part either in the Court of Appeals or in this Court. To permit him now to invoke statutes and rules, the express purpose of which is clearly to compel celerity of action and to bring about

finality of judgment, would be to make a travesty of these very provisions of statute and rule and to introduce and compound chaos in the administration of the criminal law.

The record of petitioner's trial in the State Court discloses that the trial was fair under every view and requirement of due process. To subject the State of New York now to the additional burden of an unnecessary defense of its procedures at this late date would be to do that which this Court by Cardozo, *J.* warned against in *Snyder* v. *Massachusetts,* 291 U. S. 97, 122, 78 L. Ed. 674, 687, 54 S. Ct. 330, 90 A. L. R. 575:

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law and set the guilty free."

II.

The petition should be denied for want of jurisdiction.

Dated: Brooklyn, New York,
July 1954.

Respectfully submitted,

EDWARD S. SILVER
District Attorney
Kings County, New York

WILLIAM I. SIEGEL
Assistant District Attorney
of Counsel

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No. 183.

SANTO CAMINITO,

Petitioner,

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Reply Brief in Support of Petition for Writ of Certiorari.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1954

Supreme Court of the United States

OCTOBER TERM, 1954,

No. 183.

SANTO CAMINITO,
Petitioner,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In the light of a convincing demonstration of a violation of due process on factual and legal grounds, the District Attorney of Kings County rests his opposition to this petition on a technical objection to jurisdiction. The objection is specious.

The petition discloses with precision the factual details upon which we believe the legal conclusion must rest, that this petitioner was denied due process of law. It likewise reviews the authorities which sustain that conclusion.

In answer, the brief submitted in opposition glibly concludes:

> "The record of petitioner's trial in the State Court discloses that the trial was fair under every view and requirement of due process."

In our opinion the aforesaid conclusion is not justified by the record. In any event, the ultimate determination as to whether or not there was due process is one for this Court, not for the District Attorney.

The District Attorney's only argument in opposition to this petition is addressed to the question of jurisdiction.

His argument proceeds as follows:

1. That the ninety-day limitation within which petitioner may apply for certiorari has expired because, he says, the petitioner's motion for a re-argument in the Court of Appeals of New York was not a motion for re-argument.

2. To compel the District Attorney to establish the fact that there was compliance with all of the requirements of due process is too great a burden to impose upon a responsible public official.

With respect to the ninety-day period of limitation:

It was clearly pointed out in the petition, and the record shows, that a motion for re-argument was made in the New York Court of Appeals and that the motion was entertained and denied on June 3, 1954. A certified copy of the order of denial is part of the record before the Court. The present petition was filed in this Court on July 1, 1954. Accordingly, under the cases cited on page 3 of the petition, the application is timely.

The only case cited in the brief in opposition, *Department of Banking v. Pink,* 317 U. S. 264, sustains the petitioner's view. In that case the motion in the New York Court of Appeals was merely to amend the remittitur. No question of substance was raised. No request was made that a determination of rights previously adjudicated be altered. Here the situation is exactly the opposite. Serious constitutional questions were presented to the Court of Appeals on the motion for re-argument, and the motion sought a reversal of the determination previously adjudicated by that Court.

In order that there may be no question about the statement thus made, we quote the first two paragraphs of the printed brief submitted to the Court of Appeals in support of petitioner's motion for re-argument:

> "The appellant, Santo Caminito, moves this Court for re-argument of an appeal heretofore taken by him to this Court from a judgment of conviction of murder in the first degree, under which he was sentenced to State Prison for the term of his natural life (63).
>
> "The basis for the motion is that this Court overlooked or misapprehended basic constitutional rights of the appellant in affirming a judgment which rested solely upon a confession obtained through duress during a period of unlawful detention, without arraignment."

Accordingly, giving due consideration to the nature of the relief sought in the Court of Appeals, the following language in *Department of Banking v. Pink* determines the jurisdictional question before the Court:

> "A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties."

There can be no doubt that the application for re-argument in the Court of Appeals was timely. Rule XX of the Rules of the New York Court of Appeals, dealing with motions for re-argument, places no restriction upon the time within which the motion may be made. That Court entertained the motion to re-argue and denied the motion.

The District Attorney, in arguing that the 1954 application to the Court of Appeals was not, in fact, a

motion for re-argument asserts that the points raised by petitioner on the motion to re-argue were identical with the points raised on the appeal from the judgment of conviction. The District Attorney is in error. The points argued on the *original* appeal to the Court of Appeals are correctly stated as items 1, 2 and 3 on page 4 of the District Attorney's brief. However, the same points were not made on the 1954 motion for re-argument, which was decided on June 3, 1954. Only one point was made on said motion, which point reads:

> "The admission of the confession as the sole basis for the conviction, constitutes a deprivation of defendant's liberty without due process of law."

The argument is not identical with the points raised on the original appeal. In order that this Court shall not be in doubt concerning these facts, we are forwarding to the Clerk of this Court, together with this reply brief, a copy of the notice of motion and brief submitted to the New York Court of Appeals in support of the motion for re-argument in that Court.

The burden imposed upon the District Attorney:

The learned District Attorney argues, on page 8 of his brief in opposition, that he should not be subjected to a defense of the procedures on the trial. The District Attorney should welcome the opportunity to establish, once and for all, that the procedures employed in this case—if such be the fact—were in total compliance with the constitutional safeguards afforded to every person accused of a crime. What the District Attorney says in effect is this: "We would prefer not to do the work involved in establishing that there was due process. Let the defendant, therefore, remain in jail for the rest of his life."

We recognize that a point is reached where litigation must be terminated. However, whatever the reason may be, there has never been in this case a Federal determination of the substantial Federal constitutional questions raised in this petition. Such a determination should be available to petitioner, whether it come about through the granting of this application for certiorari, or through the medium of a new *habeas corpus* application submitted to a Federal District Court. Questions as serious as those presented on this petition should not be disposed of by default.

There is no merit to the opposition to this petition, on legal, factual, moral or even technical grounds.

We urge that the petition be granted.

Dated: New York, N. Y., July 29, 1954.

Respectfully submitted,

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Attorney for Petitioner.

MAURICE EDELBAUM,
STANLEY L. GLUCK,
Of Counsel.